For Opinion See 289 F.3d 1300

United States Court of Appeals,

Eleventh Circuit.

Patricia ESFELD and Donald Esfeld, Appellants,

v.

COSTA CROCIERE, S.P.A., Appellee.

Eleanor COHON and Julian Cohon, her husband, Appellants,

v.

COSTA CROCIERE, S.P.A., Appellee.

Belle BESTOR and Stanley Bestor, her husband, Appellants,

v.

COSTA CROCIERE S.P.A., a foreign corporation doing business in Miami-Dade County, Florida, Appellee.

Nos. 01-11072BB, 01-11073BB, 01-11074BB.

May 4, 2001.

On Appeal from the United States District Court Southern District of Florida

Brief of Appellants

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***XII** *STATEMENT REGARDING ORAL ARGUMENT*

The Appellants respectfully request oral argument in this case. It presents two questions of law which arise *de novo* in this Court, concerning the application of *Erie Co. v. Tompkins,* 304 U.S. 64 (1938) and its progeny to

the issue of forum non conveniens in a diversity action in federal court. The first is whether the district court's application of Florida's rule of forum non conveniens was foreclosed by this Court's decision in *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985), *cert. denied*, 474 U.S. 948 (1986). The second, assuming *arguendo* that the district court properly distinguished *Sibaja*, is whether the district court misapplied the *Erie* doctrine in holding that a state's rule of forum non conveniens should apply only when it is more hostile to the plaintiffs choice of forum than the federal standard, because such a state rule poses no challenge to the federal court's control over its docket. The district court held that concern for its docket was the only discernible federal interest for *Erie* purposes. Because Florida's law of forum non conveniens forbade the plaintiffs' actions, the district court found it applicable under *Erie*.

The instant case therefore presents important legal questions concerning both this Court's precedent and the *Erie* doctrine. Each of these questions embraces an interesting and complicated set of considerations--the second implicating a vast number of federal decisions in a variety of analogous contexts. The Appellants respectfully submit that oral argument will assist the Court in addressing those considerations.

***1** I

STATEMENT OF JURISDICTION

This is an appeal of a final order under 28 U.S.C. §1291.

II

ISSUES ON APPEAL

A. WHETHER THE DISTRICT COURT'S APPLICATION OF THE FLORIDA STATE RULE OF FORUM NON CONVENIENS CONTRAVENED THE MANDATE OF *SIBAJA v. DOWCHEMICAL CO.*, 757 F.2D 1215 (11TH CIR. 1985), *CERT. DENIED*, 474 U.S. 948 (1986).

B. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE DOCTRINE OF *ERIE R. CO. v. TOMPKINS*, 304 U.S. 64 (1938) REQUIRES APPLICATION OF A STATE'S LAW OF FORUM NON CONVENIENS WHENEVER THAT LAW IS MORE RESTRICTIVE OF A PLAINTIFF'S CHOICE THAN THE FEDERAL FORUM-NON-CONVENIENS DOCTRINE, AND THEREFORE DOES NOT THREATEN A FEDERAL COURT'S CONTROL OF ITS DOCKET.

III

STATEMENT OF THE CASE AND FACTS

A. An Overview of the Facts. The following facts, with appropriate citations to the Record, will be outlined in the succeeding sub-sections: Three elderly American couples brought actions in Florida state court growing out of a van accident which they suffered in Viet Nam while on a cruise conducted by Defendant Costa Crociere, S.P.A., an Italian corporation which does all of its American business in South Florida, and is now owned by Miami's Carnival Corporation. Costa Crociere and the other defendants in the state actions (Florida companies through which it does business) moved to dismiss for forum non conveniens, insisting that notwithstanding the Florida Supreme Court's adoption, in *Kinney System, Inc. v. Continental Ins. Co.*, 674 So.2d 86 (Fla. 1996), of the federal standard for ***2** adjudicating forum-non-conveniens motions, the Florida standard was different from the federal standard in one critical respect: in considering whether to dismiss an action in favor of a foreign jur-

isdiction, the Florida courts could look only to those contacts between the litigation and the State of Florida--not to any other contacts in the United States. The Florida appellate court agreed, holding that only Florida contacts were relevant, and ordered that the cases be dismissed for forum non conveniens, leaving the plaintiffs “free to bring suit in any other jurisdiction which will entertain” their cases (citation *infra*).

The Plaintiffs therefore refiled against Defendant Costa Crociere in federal court in Miami, prepared to address the federal forum-non-conveniens standard, which looks to all American contacts because the defendant is seeking dismissal in favor of a foreign jurisdiction. *See infra* note 4. But to the Plaintiffs' surprise, Defendant Costa Crociere pleaded res judicata, taking the diametrically-opposite position that the Florida and federal standards of forum non conveniens were the same! After reviewing Costa Crociere's Florida pleadings and the Florida court's decisions, Chief Judge Edward B. Davis held Costa Crociere to its original position; applied the federal f.n.c. standard *de novo;* and held that the totality of all American contacts required rejection of Costa Crociere's motion.

On Judge Davis' retirement, the case was reassigned to the Honorable Shelby Highsmith. Judge Highsmith accepted as the law of the case both Judge Davis' finding that the Florida and federal standards are different, and Judge Davis' ruling that dismissal was not warranted under the federal f.n.c. standard. But without inviting memoranda or argument, Judge Highsmith raised and resolved *sua sponte* a new question which had not been raised by Costa Crociere--whether Judge Davis should not have applied the federal f.n.c. standard to this diversity case in the first place, notwithstanding this Court's instruction to that effect ***3** in *Sibaja v. Dow Chemical Co.,* 757 F.2d 1215 (11th Cir. 1985), *cert. denied,* 474 U.S. 948 (1986).

In a thoughtful and scholarly opinion (but without the benefit of input by the parties), Judge Highsmith reasoned that *Sibaja* and its progeny (all of the other federal courts to address this issue, with one possible exception) have applied the federal f.n.c. standard in diversity cases only because the state standard in question was more accepting of the plaintiffs choice of forum, and application of the state standard therefore would have threatened the federal courts' right to control their dockets. In the instant case in contrast, Judge Highsmith reasoned, the Florida standard is more restrictive--indeed, the Florida court already had dismissed the Plaintiffs' cases--and in that context application of the state f.n.c. rule would not pose any threat to the district court's control over its docket. In those circumstances, Judge Highsmith reasoned, unless some other important federal interest required application of the federal standard, the balancing test called for by the *Erie* doctrine would counsel deference to the state's f.n.c. rule. Finding no other federal interest, Judge Highsmith dismissed these cases for forum non conveniens, thus remanding these elderly American plaintiffs to the courts of Italy, in redress of an accident which occurred in Viet Nam, and had no connection to Italy of any kind. This ruling would relegate American plaintiffs--solicited in the U.S. by a corporation which does substantial business in the U.S., *see infra* note 1--to a foreign forum where they have never been, and which has no connection whatsoever with the incident, the witnesses, or any issue in the case.

B. The Proceedings in Florida State Court. As the district court noted (R2-52-2), the Bestors, who reside in California, and the Cohons and Esfelds, who reside in Washington, in 1994 took a Costa Crociere cruise in the Western Pacific, and were injured in a van ***4** accident while on shore in Viet Nam.[FN1] As the district court noted, the Bestors, Cohons and Esfelds filed separate lawsuits in Florida state court; the Defendants moved to dismiss for forum non conveniens; the trial court denied their motions; and the Defendants in the *Bestor* case appealed to Florida's Third District Court of Appeal (R2-3-5).[FN2] In challenging the trial court's ruling, and notwithstanding the Florida Supreme Court's adoption of the federal forum-non-conveniens standard in *Kinney System, Inc. v. Continental Ins. Co.,* 674 So.2d 86 (Fla. 1996), Costa Crociere argued strenuously that the federal

and Florida f.n.c. standards are different. Under the federal standard, because the motion seeks dismissal in favor of a foreign jurisdiction,[FN3] given that we have a unitary federal system, the court must aggregate ***5** all U.S. contacts, in every state, against the motion.[FN4] But Costa Crociere insisted that the state standard is different: "Under Florida law the relevant inquiry is not whether the Appellees are United States citizens, but whether they are *Florida* residents", R1-13, Tab 16 at 9-10 (emphasis in original).[FN5]

FN1. The Plaintiffs had received uninvited solicitations in the United States from Defendant Costa Crociere, through American travel agents; their bookings were handled by the soliciting U.S. travel agents; and it was arranged through the Defendant's affiliated company in South Florida (*see* R1-13, Tab 2, ¶2; Tab 9, ¶2; Tab 11, ¶2). All of Costa Crociere's U.S. marketing, advertising and sales are done through an office in Miami, staffed by over 110 employees (R1-13, Tab 3, pp. 3-10; Tab 5; Tab 6; Tab 15, pp. 8-20). It produces between 30,000 and 52,000 U.S. customers every year (R1-13, Tab 3, pp. 12-13). Costa Crociere advertises in all major U.S. markets; maintains an Internet site which is run from Miami; and issues brochures listing Miami as its address (R1-13, Tab 3, pp. 11-12, 22; Tab 10). The tour director for this particular cruise, who arranged the van tour which resulted in the accident, now lives in South Florida. All witnesses with direct knowledge about this accident live in the United States. All of the Plaintiffs' treating physicians, and all witnesses who can testify about their injuries, live in the United States (R1-13, Tabs 1, 2, 9, 11). After the accident in this case, Costa Crociere was acquired by Miami's Carnival Corporation (R1-13, Tab 3, pp. 19-20; Tab 4, pp. 2-3; Tab 13, pp. 4, 20). Apart from Costa Crociere's residence, this lawsuit has nothing whatsoever to do with Italy.

FN2. The interlocutory venue ruling was appealable under Fla. R. App. 9.130(a)(3)(A). For unknown reasons, the Defendants in *Cohon* and *Esfeld* did not appeal the trial court's ruling in their cases.

FN3. Because transfers within the federal system are now governed by statute, 28 U.S.C. §1404(a), the common law f.n.c. doctrine is limited to dismissals in favor of a foreign jurisdiction. *See American Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994).

FN4. *See DiRienzo v. Philip Services Corp.*, 232 F.3d49, 62 (2nd Cir. 2000); *Howe v. Goldcorp., Inv., Ltd.*, 946 F.2d 944, 945-46, 951-53 (1st Cir. 1991) (Breyer, J.), *cert. denied*, 502 U.S. 1095 (1992); *Mercier v. Sheraton International, Inc.*, 935 F. 2d 419, 429 (1st Cir. 1991), *cert. denied*, 508 U.S. 912 (1993); *Reid-Walen v. Hansen*, 933 F.2d 1390.1394 (8th Cir. 1991); *Allen v. Lloyd's of London*, 1996 WL 490177, *28 (E.D. Va.), *rev'd on other grounds*, 94 F.3d 923 (4th Cir. 1996); *Homestake Mining Co. of California v. Potash Corp. of Saskatchewan, Inc.*, 1992 WL 122809, *5 (N.D. Ill. 1992); *Interpane Coatings v. Australia & New Zealand Banking Group, Ltd.*, 732 F. Supp. 909, 915 (N.D. Ill. 1990). *See, e.g., Macedo v. Boeing Co.*, 693 F.2d 683, 690 (7th Cir. 1982) (balancing contacts with the other U.S. state implicated); *Transamerica Leasing Inc. v. La Republica de Venezuela*, 21 F. Supp.2d 47, 53 (D.D.C. 1998) (same), *dismissed in part and remanded in part on other grounds*, 200 F.3d 843 (D.C. Cir. 2000).

FN5. Costa Crociere made this argument repeatedly: "The [Florida] Supreme Court [in *Kinney*] is concerned only with *Florida's* interest in a given case" (R1-13, Tab 17 at 8, emphasis in original); "Under Florida law the presumption in favor of maintaining the plaintiffs chosen forum is available only to Florida residents" (R1-13, Tab 17 at 10); "The [Florida] Supreme Court [in *Kinney*], however, drew its distinction between only Florida and non-Florida residents" (*id.*).

The Florida appellate court agreed, holding that the lawsuit had "no meaningful relationship to Florida," and that "Florida's interests in this litigation are next to nonexistent." *Pearl Cruises v. Bestor,* 678 So.2d 372 (Fla. 3rd DCA), *review denied,* 689 So.2d 1069 (Fla. 1996). After that decision, the Defendants in *Cohon* and *Esfeld* filed new motions to dismiss; the trial court denied their motions; and the Defendants appealed (*see* R2-52-4-5). In reliance upon its earlier decision in *Bestor,* the appellate court reversed, *Pearl Cruises v. Cohon,* 728 So.2d 1226 (Fla. 3rd DCA), *review denied,* 744 So.2d 453 (Fla. 1999). In doing ***6** so, the Florida court held explicitly that the two standards are different, *id.* at 1228 n.*:

Relying on federal authority, plaintiffs contend that in deciding whether to grant a forum non conveniens motion, a Florida court must aggregate all of the plaintiffs' United States contacts in deciding whether to grant the motion. *See Reid-Walen v. Hansen,* 933 F.2d 1390, 1394 & n.5 (8th Cir. 1991). That argument is without merit. The federal courts are a unitary system having nationwide jurisdiction. If there is another more convenient forum in the United States, then the remedy is to transfer the case under 28 U.S.C. § 1404, rather than dismiss for forum non conveniens. *See* 933 F.2d at 1394 n.5.

As the text of Florida Rule of Civil Procedure 1.061 clearly states, however, the inquiry for the Florida courts is whether "a satisfactory remedy may be more conveniently sought in a jurisdiction other than Florida...." Since the Florida courts' territorial jurisdiction is confined to the state boundaries, dismissal under the forum non conveniens doctrine is appropriate where the trial court concludes, after consideration of the relevant factors, that the more convenient forum is elsewhere in the United States, or abroad.

The Florida court in *Bestor* ordered dismissal of the action in favor of "any other jurisdiction which will entertain it," 678 So.2d at 373; and held in *Cohon* and *Esfeld* that "[a]s in *Bestor,* the plaintiffs are free to refile in Italy or in any other jurisdiction which will entertain the cases." 728 So.2d at 1228. In the belief that the different federal f.n.c. standard made it an alternative jurisdiction willing to entertain the case, the Bestors, Cohons and Esfelds refiled their actions in the Federal District Court for the Southern District of Miami (R1-1; R3-1; R4-1). According to Costa Crociere, Florida is the *only* American forum in which it is subject to jurisdiction.

C. Chief Judge Davis' Ruling. The *Bestor* case was filed first (R1-1). Notwithstanding its successful contention in state court that the federal and Florida f.n.c. ***7** standards were different, Costa Crociere moved to dismiss the *Bestor* complaint on the grounds of resjudicata and collateral estoppel[FN6], acknowledging that the doctrine of collateral estoppel was available only if "the applicable federal *forum non conveniens* standard operates as the same law as applied by the Florida courts" (R1-7-2; *see id.* at 5).[FN7] But Costa Crociere then reversed positions 100% by contending that the Florida and federal standards were identical (R 1-7-6-7). After reviewing Costa Crociere's submissions in the Florida courts, and the Florida appellate court's decision, Chief Judge Edward B. Davis denied the motion (R1-29-2-3). Judge Davis emphasized that the Florida appellate court had "focused its attention on the connection of the action, and its operative facts, to Florida," while the federal "courts must focus their attention on the relevant action's connection to the United States as a whole, not just on the action's connection with a specific state or jurisdiction" (R1-29-3). Therefore, because collateral estoppel requires identical legal standards in the two forums), *see supra* note 7, the court held that "collateral estoppel does not bar the instant action because the forum non conveniens inquiry undertaken by the [Florida] Third District [Court] crucially differs from the forum non conveniens inquiry that this Court must undertake" (*id.*).

> FN6. The doctrine of *res judicata* was inapplicable, because Florida law requires a final judgment on the merits. *See Sewell v. Merrell, Lynch, Pearce, Fenner & Smith, Inc.,* 94 F.3d 1514, 1518 & n.3 (11th Cir. 1996) (Fla. law); *Casines v. Murchek,* 766 F.2d 1494, 1498-99 (11th Cir. 1985) (Fla. law).

> FN7. *See Montana v. United States,* 440 U.S. 147, 153-54 (1979); *I.A. Durbin, Inc. v. Jefferson Nation-*

> *al Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986). *See also Parsons v. Chesapeake & Ohio R. Co.*, 375 U.S. 71, 73 (1963) (even if federal and state f.n.c. standards were the same, prior state f.n.c. dismissal was not collateral estoppel because the operative facts, like the distance to the nearest federal vs. state courthouses, were different).

Judge Davis then proceeded to analyze all of the contacts between the instant case and the United States as a whole (some of the relevant facts are outlined *supra* note 1), and held ***8** that Costa Crociere, now owned by a corporation headquartered in Miami, was capable of transporting all of its employee witnesses to the United States (R1-29-6-7); and that "[t]he Bestors reside in the United States," "[t]he other people who were in the vehicle at the time of the accident reside in the United States," "[p]ossible eyewitnesses to the accident who were not in the vehicle reside in the United States," and "[t]he doctors who treated the Bestors are located within the United States" (R1-29-7). Given the substantial American contacts, and the burden of transporting all of these witnesses to Italy, whose sole contact with the litigation (an accident in Viet Nam) was Costa Crociere's headquarters there, Judge Davis found that the private-interest factors predominated in favor of retaining the case (R1-29-7-8).

As to the public-interest factors, the court emphasized Costa Crociere's substantial marketing efforts in the United States and the plaintiffs' United States citizenship, concluding that "the United States has a sufficient interest in the Bestors' case so as to warrant the investment of American judicial resources" (R1-29-9). Under the federal standard, the district court therefore denied Costa Crociere's motion to dismiss for forum non conveniens (R1-29-13). Judge Davis subsequently denied Costa Crociere's motion for reconsideration (R1-35).

D. Judge Highsmith's Ruling. A few months later, Judge Davis retired from the bench, and the *Bestor* case was assigned to the Honorable Shelby Highsmith (*see* R2-52-6). At approximately the same time, the Cohons and Esfelds filed separate lawsuits in federal court; both cases eventually were reassigned to Judge Highsmith (*see id.*); and Judge Highsmith consolidated them (R3-1; R3-13; R4-1; R4-12; *see* R2-52-6 & n.3).

In the *Cohon/Esfeld* case, Costa Crociere again moved to dismiss (R1-43; *see* R2-52-***9** 6). As Judge Highsmith noted in his subsequent order, Costa Crociere argued collateral estoppel, based on the state court's rulings; and that the action was barred in any event under the federal forum-non-conveniens doctrine; and it also argued that the action was barred by the *Rooker/Feldman* doctrine, which precludes the assertion of federal jurisdiction over challenges to state court decisions (R2-52-7).[FN8]

> FN8. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

Judge Highsmith responded to this motion by issuing a 20-page order in both the *Cohon/Esfeld* and *Bestor* cases (R2-52). As we have noted, that order rejected the arguments which Costa Crociere had raised. As to the preclusive claims of collateral estoppel and *Rooker/Feldman*, "these two asserted grounds are too narrowly focused, as neither of the preclusive doctrines specifically invoked is applicable here because, pursuant to Judge Davis' ruling in his February 25, 2000 order, the Florida forum non conveniens analysis and the federal forum non conveniens analysis are distinct" (R2-52-7-8). And Judge Highsmith later agreed with that ruling: "As pointed out by Judge Davis' February 25, 2000 order, however, there is a significant difference in application between the Florida and federal standards; i.e., the Florida analysis looks to the action's contacts with Florida and the federal analysis looks to the action's contacts with the United States. In the present cases, this distinction results in a conflict between state and federal law, namely these actions are barred by forum non conveniens under Florida

law while they are not under federal law" (R2-52-15-16). Moreover, Judge Highsmith noted in a footnote, even if he had not agreed with Judge Davis that the two standards are different, "[t]he Court considers Judge Davis' interpretation of the standards to be binding as the law of the case" (R2-52-16 n.8).

***10** Judge Highsmith also declined Costa Crociere's invitation to revisit Judge Davis' determination that under the federal f.n.c. standard, the motions to dismiss should be denied (R2-52-16 n.9): "The court defers to Judge Davis' analysis of the federal forum non conveniens standard in his February 25,2000 order." However, without advising the parties or asking for memos or argument, Judge Highsmith *sua sponte* raised a new issue which Costa Crociere had not advanced--whether Chief Judge Davis had erred in applying the Florida f.n.c. standard in this diversity case, "under the Rules of Decision Act, 28 U.S.C. § 1552, and the teachings of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny" (R2-52-8).[FN9]

> FN9. The Rules of Decision Act provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." The Act "is merely declarative of the rule which would exist in the absence of the statute." *Mason v. United States*, 260 U.S. 545, 559 (1923), *quoted in Erie*, 304 U.S. at 72. *See Sibaja v. Dow Chemical Co.*, 757 F.2d 1215, 1219 n.6 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985); L. Tribe, *American Constitutional Law* 53-22-23, at 496 n. 188 (3rd ed. 2000).

1. Distinguishing Sibaja. The threshold question for Judge Highsmith was whether the *Erie* analysis was controlled by this Court's decision in *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215, 1218-19 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985), which affirmed application of the federal f.n.c. standard in a diversity case. *Sibaja* held that the federal f.n.c. standard "derives from the court's inherent power, under article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice and oppression." *Id.* at 1218. It emphasized "[t]he court's inherent power to protect the integrity of its process through forum non conveniens." *Id.* This was a broad invocation of the federal courts' authority--indeed, responsibility--not only ***11** to protect their dockets against the intrusion of cases which do not belong there, but also to insure the rights of litigants in those cases which *do belong* in the federal system. The Court in *Sibaja* emphasized that responsibility, *id.* at 1218, by quoting by analogy a Supreme Court pronouncement on the inherent power to punish contempt, in *Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry. Co.*, 266 U.S. 42, 65-66 (1924):

[The power to punish contempt] is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress; but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted.

Of this passage, the Court said in *Sibaja*, 757 F.2d at 1218: "We think this statement applies with equal force to the authority of a federal district court to dismiss an action for want of an appropriate forum." Thus, the Court assimilated to the forum-non-conveniens issue the Supreme Court's recognition of the federal courts' power not only to decline to exercise their jurisdiction where appropriate, but to assert jurisdiction, and to exercise their powers, where that is appropriate.

Only after emphasizing this broad authority did the Court in *Sibaja* add that "[t]he [federal] Court's interest in controlling its crowded docket *also* provides a basis for the Court's inherent power to dismiss on grounds of *for-*

um non conveniens." *Id.* (emphasis added). And it returned to broader themes in conclusion, holding that "[t]he *forum non conveniens* doctrine is a rule of venue, not a rule of decision"; and thus, "under the circumstances presented here, whether to exercise its jurisdiction and decide the case was ***12** not a decision going to the character and result of the controversy. Rather, it was a decision that occurred before, and completely apart from, any application of state substantive law." *Id.* at 1219. "We hold, accordingly, that the district court's application of the doctrine of *forum non conveniens* in this case did not operate as a state substantive rule of law and thus transgress *Erie's* constitutional prohibition." *Id.*

Reading *Sibaja* narrowly--indeed, picking up on the single sentence from the opinion concerning the federal courts' "crowded docket"--Judge Highsmith ruled that *Sibaja*, as well as a subsequent decision citing it--*In Re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1 147 (5th Cir. 1987) (en banc), *vacated on other grounds, sub nom. Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989)--both held only that "when faced with a diversity case in which the applicable state law did not recognize forum non conveniens ... the inherent power of a court to control its docket trumped *Erie's* mandate that state law apply in diversity cases" (R2-52-13). By thus ascribing to *Sibaja* and *New Orleans* exclusive concern for the federal courts' dockets, Judge Highsmith was free to conclude that because the state f.n.c. rule here is more restrictive than the federal rule, "there is no conflict between the applicable state law and the Court's inherent power to regulate its docket, as there was in *Sibaja* and *In Re Air Crash Near New Orleans, La.*" (R2-52-15). And with *Sibaja* thus out of the way, the district court was free to consider *de novo* "whether the Rules of Decisions Act and *Erie* command that the state law determination of the forum non conveniens issue be given effect" (R2-52-15).

b. The District Court's Erie Analysis. The district court held that "the overriding federal interest justifying application of the federal [f.n.c.] standard has been the federal district courts' inherent power to control their dockets"; but

***13** [i]n the present case, that interest is not implicated because the Florida standard is more restrictive than the federal standard. When the state standard is more restrictive than the federal standard, rather than more liberal, the danger of the district court becoming a de facto open forum, under the guise of diversity jurisdiction, dissipates. Thus, under the unique [sic] circumstances presented here, there is no compelling federal interest of self-regulation, which would warrant application of the federal standard over the state standard (R2-52-17; *see id.* at 15-18).

And in contrast, the court found that the competing state interests were significant: application of the federal standard would encourage forum shopping and result in the inequitable administration of justice, because diversity defendants in Florida would be more amenable to suit in federal court than they would be in state court, thus frustrating "state policy decisions concerning court access" (R2-52-16-17).[FN10]

> FN10. The district court gave no consideration to the equivalent inequity of applying a different f.n.c. standard in different federal districts. *See infra* pp. 25-27.

Thus the district court held that when a state's forum-non-conveniens rule is more hospitable to a plaintiffs choice of forum than the federal rule, *Sibaja* holds that the more-restrictive federal rule should apply. But when the state f.n.c. rule is more restrictive than the federal rule, and thus less favorable to a plaintiffs choice of forum, the district court held that *Sibaja* is not controlling, and that *Erie* requires that the federal court apply the more-restrictive state f.n.c. rule. Or to put the matter plainly, Judge Highsmith's (perhaps inadvertent) holding was that in a diversity case, the federal court should apply whichever forum-non-conveniens rule hurts the plaintiff the most.

The Plaintiffs moved for clarification on one point, advising the district court that because it had purported to apply Florida law on the issue of forum non conveniens, it was ***14** required to follow Rule 1.061, Fla. R.Civ.P., which conditions any forum-non-conveniens dismissal on the agreement of all defendants to submit to jurisdiction in any alternative forum, and to waive any otherwise-applicable statute of limitations (R2-53-3). The district court's order of clarification recited that "[t]his Court dismissed these cases pursuant to the *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938) doctrine, not for forum non conveniens" (R2-60-2). However, the district court added that "[p]ursuant to the applicable Florida law, if Plaintiffs refile their cases in another forum within 120 days of the date that the instant dismissal becomes final (i.e., the date of this order), Defendant 'shall be deemed to automatically stipulate that the action[s] will be treated in the new forum as though [they] had been filed in that forum on the date [they] were filed in Florida.' Fla. R.Civ.P. 1.061 (c)-(d)" (*id.*). The court expressed "no opinion as to whether any particular jurisdiction should or should not entertain these cases" (*id.*). Nor did it explicitly require Costa Crociere to submit to jurisdiction anywhere. This appeal followed

IV

THE STANDARD OF REVIEW

The issue of whether the district court erred in departing from the mandate of *Sibaja*, and the issue of whether the district court misapplied the *Erie* doctrine, are issues of law which arise *de novo* in this Court. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); *Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 387 (11th Cir. 2001); *Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33, 35 (5th Cir. 1997); *Alexander Proudfoot Co. World Headquarters, L.P. v. Thayer*, 877 F.2d 912, 916 (11th Cir. 1989); *Bailey v. Dolphin International*, 697 F.2d 1268, 1274 (5th Cir. 1983); *Rowe v. General Motors Corp.*, 457 F.2d 348 (11th Cir. 1972).

V *SUMMARY OF THE ARGUMENT*

First, the district court's ruling was precluded by *Sibaja v. Dow Chemical Co.*, which held that federal law controls disposition of a forum-non-conveniens motion in a diversity case. *Sibaja* is not based solely on the federal courts' control of their dockets, and thus does not countenance selection of whatever f.n.c. rule will hurt the plaintiff the most. It is based as well on a number of more salutary federal principles, which apply just as much when the state's f.n.c. rule is less hospitable to the plaintiff than the federal rule. *Sibaja* is controlling in this case, and therefore governed the district court's disposition of the motion.

Moreover, even if the district court had been free to undertake its own *Erie* analysis, and thus a panel of this Court may do so *de novo*, as every federal court to address this issue has ruled (with the exception of one obsolescent outcome-determinative ruling of the Second Circuit), overriding federal interests require application of the federal f.n.c. rule in a diversity case. These include maintaining the integrity of the federal system by assuring the availability of a federal forum, especially in diversity cases; protecting the unitary federal system by requiring uniform f.n.c. standards in all federal districts; protecting the overriding federal interest in international relations, which are implicated in every forum non conveniens motion; and protecting the federal interest in a plaintiffs right to choose his forum. In numerous analogous contexts, the federal courts have recognized these values in administering the *Erie* doctrine. They compel application of the federal f.n.c. standard in all diversity cases.

***16** VI

ARGUMENT

A. THE DISTRICT COURT WAS REQUIRED BY *SIBAJA v. DOW CHEMICAL CO.*, 757 F.2D 1215 (11TH CIR. 1985), 474 U.S. 948 (1986), TO APPLY THE FEDERAL RULE OF FORUM NON CONVENIENS.

If the Plaintiffs are correct that *Sibaja* controls the issue of whether Costa Crociere's motion is governed by the federal forum-non-conveniens standard, then of course the district court had no discretion to depart from its authority.[FN11] Likewise, a panel of this Court would be required to follow *Sibaja*, in the absence of *en banc* reconsideration.[FN12]

FN11. *See Fishman & Tobin v. Tropical Shipping & Construction Co.*, 240 F.3d 956, 965 n.14 (11th Cir. 2001); *Young v. I.N.S.*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000); *United States v. Krilich*, 178 F.3d 859, 861 (7th Cir. 1999); *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997); *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1121-22 n.8 (5th Cir. 1992); *Sturgeon v. Strachan Shipping Co.*, 698 F.2d 798, 800 (5th Cir. 1983), *cert. denied*, 469 U.S. 883 (1984).

FN12. *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1076 (11th Cir.), *cert. denied*, _____ U.S. _____, 121 S. Ct. 381 (2000); *United States v. Holman*, 680 F.2d 1340, 1356 n.11 (11th Cir. 1982); *McDaniel v. Fulton National Bank of Atlanta*, 543 F.2d 568, 570 (5th Cir. 1976); *United States v. Lewis*, 475 F.2d 571, 574 (5th Cir. 1973). *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the Fifth Circuit in effect prior to October 1, 1981).

1. Judge Highsmith's Ruling. Judge Highsmith focused on two sentences in *Sibaja* assertedly limiting the Court's holding to the case at hand (R2-52-12). This Court held in *Sibaja* that "the trial court's decision, under the circumstances presented here, whether to exercise its jurisdiction and decide the case was not a decision going to the character and result of the controversy. Rather, it was a decision that occurred before, and completely apart from, any application of state substantive law." 757 F.2d at 1219. The Court therefore held ***17** "that the district court's application of the doctrine of *forum non conveniens* in this case did not operate as a state substantive rule of law and thus transgress *Erie's* constitutional prohibition." *Id.*

In the district court's view, the *Sibaja* ruling--"in this case," under the "circumstances presented here"--was limited to those instances in which a state's f.n.c. standard would permit the litigation but the federal f.n.c. standard would not, thus implicating the district court's "inherent power to regulate its docket ..." (R2-52-15). As the district court emphasized (R2-52-12), this Court held in *Sibaja* that "[t]he Court's interest in controlling its crowded docket also provides a basis for the Court's inherent power to dismiss on grounds *of forum non conveniens* ...." 757 F.2d at 1218. Judge Highsmith therefore felt free not to follow *Sibaja*, because
[i]n the present case, that interest is not implicated because the Florida standard is more restrictive than the federal standard. When the state standard is more restrictive than the federal standard, rather than more liberal, the danger of the district court becoming a *de facto* open forum, under the guise of diversity jurisdiction dissipates. Thus, under the unique circumstances presented here, there is no compelling federal interest of self-regulation, which would warrant application to the federal standard over the state standard.

Finding no federal interest, and emphasizing the competing state interests inherent in *Erie* doctrine--"(1) the prevention of forum shopping and (2) the equitable administration of justice" (R2-52-17)--the district court held that *Sibaja* did not preclude adoption of the state f.n.c. rule in this case. The Plaintiffs respectfully submit that Judge Highsmith read *Sibaja* too narrowly. The district court understated the nature of the federal interests which this Court found predominant in *Sibaja*, and overstated the importance of the state interests.

***18** *2. The Federal Interests Recognized in Sibaja.* The Court's concern in *Sibaja* was not only with the practicalities of administering a federal docket. Indeed, in the very passage in which the Court invoked the district court's interest "in controlling its crowded docket," the court noted that this consideration "*also* provides a basis for the Court's inherent power to dismiss on grounds of *forum non conveniens*" (emphasis added)--not the *only* basis. A review of *Sibaja*, and of the cases adopting it, makes clear that this Court's identification of federal interest extended well beyond a narrow focus on the administration of a district court's docket.

The Court invoked a broader and more fundamental obligation--the obligation of the federal courts to *exercise* their jurisdiction where appropriate--to assume their Constitutional responsibility--just as much as they are charged to protect their dockets against the intrusion of inappropriate litigation. Thus *Sibaja* emphasizes the federal "court's inherent power, under article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice and oppression." *Sibaja*, 757 F.2d at 1218. It quotes the Supreme Court's declaration in *Gumble v. Pitkin*, 124 U.S. 131, 144 (1888), that "the equitable powers of courts of law over their own process, to prevent abuses, oppression and injustice, are inherent and equally extensive and efficient." As we will note in Argument B, those "inherent" "equitable powers" to prevent "oppression and injustice" extend equally--indeed, predominantly--to the federal courts' obligation to exercise their constitutional authority where appropriate. Thus the Court stressed in *Sibaja* that "[t]he [federal] court's inherent power [is] to protect the integrity of its process ..."--a rubric which obviously embraces just as much the obligation to hear cases which are properly within the court's Constitutional compass, as it does the power to limit the reach of that ***19** compass. And the Court left no doubt of that perspective, 757 F.2d at 1218, in assimilating the federal courts' contempt power to their administration of the forum-non-conveniens doctrine, quoting the Supreme Court's pronouncement in *Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry. Co.*, 266 U.S. 42, 65-66 (1924) that such authority "is essential to the administration of justice," and "the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative." This passage, and its citation by this Court, clearly connote an obligation to *exercise* federal authority where appropriate,just as the court must restrain from doing so where appropriate.

These four passages from *Sibaja*--highlighting the obligation "to prevent ... injustice"; "'to prevent abuses ... and injustice"' (*quoting Gumble*); "to protect the integrity of [the federal court's] process"; and to protect "'the administration of justice"', exercising where appropriate those "'attributes which inhere in [federal] power and are inseparable from it"' (*quoting Michaelson*)--are the fundament of the *Sibaja* holding, far more than a federal court's interest in the size of its docket. Thus, it is not surprising that only after making all of the above-quoted statements did the Court add in *Sibaja* that the federal courts' "interest in controlling its crowded docket *also* provides a basis for the Court's inherent power to dismiss on grounds of forum non conveniens ..." 757 F.2d at 1218 (emphasis added). It is respectfully submitted that the district court in the instant case erroneously constricted *Sibaja*'s recognition of an overriding federal justification for applying the federal f.n.c. rule in diversity cases.

3. The State Interests at Issue in Sibaja. Moreover, the district court also erred in dismissing this Court's disposition in *Sibaja* of the asserted state interests in the *Erie* formulation. Although the Court of course acknowledged that an f.n.c. disposition can be ***20** outcome determinative, "[t]his does not mean, however, that, in dismissing [the plaintiffs'] case, the federal court fashioned a state substantive rule in violation of *Erie*." 757 F.2d at 1218. To the contrary: "the *forum non conveniens* doctrine is a rule of venue, not a rule of decision." *Id.* Rules of decision, the Court pointed out, "are the 'substantive' law of the state, the 'legal rules [which] determine the outcome of a litigation."' *Id.* at 1219, *quoting Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945). And a "rule of venue, not a rule of decision" does not implicate substantive considerations in the manner contemplated

by *Erie, id.:*

It is true that a judge-made rule *may* qualify as a rule of decision if it substantially affects the "character or result of a litigation." *Hanna v. Plumer,* 380 U.S. 460, 467, 85 S. Ct. 1136, 1141, 14 L. Ed.2d 8 (1965). But the trial court's decision, under the circumstances presented here, whether to exercise its jurisdiction and decide the case was not a decision going to the character and result of the controversy. Rather, it was a decision that occurred before, and completely apart from, any application of state substantive law. A trial court only reaches the state rule of decision, relating to the character and result of the litigation, once it has decided to try the case and determine whether the plaintiff has a valid claim for relief. We hold, accordingly, that the district court's application of the doctrine of *forum non conveniens* in this case did not operate as a state substantive rule of law and thus transgress *Erie's* constitutional prohibition.

The Court's unambiguous holding--equally applicable to the f.n.c. motion in the instant case--was that administration of the f.n.c. issue "was not a decision going to the character and result of the controversy," but instead "occurred before, and completely apart from, any application of state substantive law." Only after deciding the f.n.c. motion, the Court held, would "[a] trial court" "reach[] the state rule of decision" and with it "the character and result of the litigation ...." That disposition is equally applicable to "the ***21** circumstances presented" in the instant case. It therefore defines the mandate of *Sibaja* which the district court in this case was required to follow.[FN13]

FN13. The Plaintiffs' reading of *Sibaja* is supported by its citation in subsequent federal decisions. The federal courts which have cited *Sibaja* attribute to it the broad and unqualified holding that federal law controls on the fn.c. issue in diversity cases. *See, e.g., Ravelo Monegro v. Rosa,* 211 F.3d 509, 511 (9th Cir. 2000), *cert. denied,* _____ U.S. _____, 121 S. Ct. 857 (2001); *Rivendell Forest Products Ltd. v. Canadian Pacific Ltd.,* 2 F.3d 990, 99192 (10th Cir. 1993) (citing *Sibaja* for the proposition that forum non conveniens is a rule of venue, not a rule of decision); *Royal Bed and Spring Co. v. Famossul Industria e Comercio de Moveis Ltda.,* 906 F.2d 45, 50 (1st Cir. 1990) (citing *Sibaja* for the proposition that forum non conveniens is a rule of venue, not a rule of decision); *In Re Silicone Gel Breast Implants Products Liability Litigation,* 887 F. Supp. 1469, 1473 (N.D. Ala. 1995). (As we note in the next argument, other federal courts have reached the same conclusion, without citing *Sibaja. See infra* n. 17).

B. THE TRIAL COURT ERRED IN HOLDING THAT THE DOCTRINE OF *ERIE R. CO. v. TOMPKINS,* 304 U.S. 64 (1938) REQUIRES APPLICATION OF A STATE'S LAW OF FORUM NON CONVENIENS WHENEVER THAT LAW IS MORE RESTRICTIVE OF A PLAINTIFF'S FORUM CHOICE THAN THE FEDERAL FORUM-NON-CONVENIENS DOCTRINE, AND THEREFORE ASSERTEDLY DOES NOT THREATEN A FEDERAL COURT'S CONTROL OF ITS DOCKET.

Even if the district court had been empowered to apply the *Erie* doctrine in this case, it erred in concluding that the state forum-non-conveniens rule should apply. This Court's review of that decision is *de novo,* and it is respectfully submitted that the appropriate application of *Erie* requires enforcement of the federal f.n.c. rule.

The Supreme Court four times has found it unnecessary to hold expressly that federal law governs the f.n.c. standard in diversity cases, because the state and federal standards ***22** were the same.[FN14] However, in upholding application of a state's f.n.c. rule in a Jones Act case brought in state court, the Supreme Court said in *American Dredging Co. v. Miller,* 510 U.S. 443, 453 (1994) that "the doctrine [of forum non conveniens] is one of procedure rather than substance."

FN14. *See Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 248 n.13 (1981); *Gulf Oil Corp. v. Gilbert,* 330

U.S. 501, 509(1947); *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 529 (1947); *Williams v. Green Bay & Western R. Co.*, 326 U.S. 549, 558-59 (1946).

By the time that statement was made in 1994, the "substance/procedure" rubric was no longer a shorthand for outcome determination, *compare Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945), but rather signalled the more complex judicial balancing which now constitutes application of *Erie* "policy."[FN15] The present standard, as the district court recognized (R2-52-10), and as *Sibaja* illustrates, is that if the state rule in question would be outcome determinative, then in the absence of a controlling Federal Rule of Procedure,[FN16] the court must "balance the federal interest in uniform process against the state interest in uniformity of results." *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1296 (11th Cir. 1999), *cert. denied*, _____ U.S. _____, 121 S. Ct. 381 (2000). *See Gasperini v. Centerfor Humanities, Inc.*, 518 U.S. 415, 432 (1996); ***23***Byrd v. Blue Ridge Rural Electric Coop., Inc.*, 356 U.S. at 533-40; E. Chemerinsky, *Federal Jurisdiction* §5.3, at 315 (3rd ed. 1999) (*quoted* at R2-52-10); 17 *Moore's Federal Practice* §124.02[2], at 124-15-17 (3rd ed. 2000).

FN15. *Guaranty Trust*, 326 U.S. at 109. *See Hanna v. Plumer*, 380 U.S. 460, 471 (1965); *Byrd v. Blue Ridge Rural Electric Coop., Inc.*, 356 U.S. 525, 536-40 (1958); *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1296 (11th Cir. 1999), *cert. denied*, _____ U.S. _____, 121 S. Ct. 381 (2000); *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 319 (5th Cir. 1987) ("In the *Erie* context, the substance/procedure dichotomy is simply shorthand for distinctions that must be drawn on the basis of policies underlying the doctrine"), *rev'd on other grounds*, 486 U.S. 140 (1988); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 715-18 (5th Cir. 1975), *cert. denied*, 423 U.S. 908 (1975).

FN16. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 25-27 (1988); *Hanna v. Plumer*, 380 U.S. 460, 471 (1965); *Reinke v. O'Connell*, 790 F.2d 850, 850-52 (11th Cir. 1986).

As we have noted, Judge Highsmith found that when the state's f.n.c. rule is stricter, and thus the federal court's docket is not threatened, there is "no compelling federal interest ... which would warrant application of the federal standard over the state standard" (R2-52-87). As we hope to demonstrate below, even when the state f.n.c. rule is less hospitable to plaintiffs than the federal rule, overriding federal interests require application of the federal rule.[FN17]

FN17. As the following discussion will demonstrate, we disagree strongly with the district court's conclusion that all of the decisions to apply federal f.n.c. law in diversity cases "have uniformly been dependent upon a compelling federal interest not at issue in the instant case: the inherent power of federal district courts to control and manage their dockets" (R2-52-11). We have cited already, *supra* note 13, the decisions which have expressly relied upon *Sibaja*. In addition, other courts have applied the federal f.n.c. rule in diversity cases for reasons broader than control of their dockets, without citing *Sibaja*. *See Ravelo Monegro v. Rosa*, 211 F.3d 509 (9th Cir. 2000), *cert. denied*, _____ U.S. _____, 121 S. Ct. 857 (2001); *Rivendell Forest Products, Ltd. v. Canadian Specific Ltd.*, 2 F.3d 990 (10th Cir. 1993); *De Aguilarv. Boeing Co.*, 11 F.3d 55 (5th Cir. 1993), *cert. denied*, 510 U.S. 1044(1994); *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489 (5th Cir. 1993). *See generally* 15 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* §3828, at 194 (2nd ed. 1986).
The only contrary decision was made at a time when *Erie* considerations were strictly outcome-determinative--*Weiss v. Routh*, 149 F.2d 193, 195 (2nd Cir. 1945) (Hand, J.); and subsequent Second Circuit decisions suggest that the issue in that circuit remains an open one. *Schertenleib v. Traum*, 589 F.2d 1156, 1162 n.13 (2nd Cir. 1978); *Olympic Corp. v. Societe Generale*, 462 F.2d 376, 378 (2nd Cir.

; *Gilbert v. Gulf Oil Corp.*, 153 F.2d 883, 885 (2nd Cir. 1946), *rev'd on other grounds*, 330 U.S. 501 (1947). *See Rivendell Forest Products, Ltd. v. Canadian Pacific Ltd.*, 2 F.3d 990, 992 n.3 (10th Cir. 1993).

We will discuss the rationales of some of the many decisions agreeing with *Sibaja* below. As we will demonstrate, they have not all "uniformly been dependent upon ... the inherent power of federal district courts to control and manage their dockets" (R2-52-11).

1. The Federal Interests.

***24** *a. Protecting the Availability of a Federal Forum.* First and most important, as we believe this Court recognized in *Sibaja*, 757 F.2d at 1218, "the integrity of [the federal courts'] process" requires federal venue rules which enforce the *availability* of a federal remedy just as much as they guard the courthouse door. *See* 17 *Moore's Federal Practice* §124.07[6][b], at 124-56.1 (3rd ed. 2000) ("maintaining integrity of the federal court system is an important countervailing consideration against applying state law"). This is certainly no less true in diversity cases than in federal-question cases. Indeed, given that diversity jurisdiction was created and sanctified in the Constitution to provide a haven against the political vagaries of state judicial systems,[FN18] it can be argued that a federal forum non conveniens standard is most important in diversity cases. If, as the district court held, the size or sanctity of its docket represents a consideration sufficient to warrant a federal standard, then surely the availability of a federal remedy in diversity cases is an even greater objective, warranting the protection of a federal standard. The district court's holding would allow different rules in different states to close the federal courthouse in precisely those cases in which the federal rule would leave it open. In the instant case, given that Costa Crociere accedes to jurisdiction only in Florida, the result would be that no plaintiff who went on a Costa cruise could ever sue Costa Crociere in the United States. That disposition is anathema to the overriding *Constitutional* objective of providing a federal forum in diversity cases. *See, e.g., Aerojet-General Corp. v. Askew*, 511 F.2d 710,716 n.6 (5th Cir.) (application of ***25** state res-judicata rule to prior federal judgment in diversity case would frustrate anti-bias purpose of diversity jurisdiction, and "federal courts would not be a reliable forum for final adjudication of a diversity litigant's rights"), *cert. denied*, 423 U.S. 908 (1975).[FN19]

FN18. *See Bank of the United States v. Deveaux*, 6 U.S. (5 Cranch) 61, 87 (1809); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 716 n.6, 717 n.9 (5th Cir. 1975) (and cases cited), *cert. denied*, 423 U.S. 908 (1975). *See also Burford v. Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting). *See generally* 15 *Moore's Federal Practice* §102App.03[1], at 102App.-4-8 (3rd ed. 2000).

FN19. We highlighted the word "Constitutional" as a counterpoint to the district court's disclaimer that the forum-non-conveniens doctrine is only a "judge-made law of administration and self regulation," and thus assertedly invokes less significant *Erie* considerations than, for example, "Federal Rules of Civil Procedure enacted pursuant to the Rules Enabling Act, 28 U.S.C. §2072." R2-52-14, *citing In Re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147, 1185-86 (5th Cir. 1987) (en banc) (Higginbotham, J., concurring), *vacated on other grounds sub nom. Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989). We strongly disagree with this characterization of the f.n.c. doctrine. Because it directly implicates the exercise of a federal court's jurisdiction under Article III, administration of the doctrine by definition affects fundamental Constitutional rights.

b. Protecting the Unitary Federal System. Second, the necessity of a federal f.n.c. standard is inherent in the nature of the federal system. It is, after all, a unitary federal system; there is one federal district court for the United States of America. Indeed, it was that truth which served as the Florida court's justification for departing from the federal f.n.c. standard in the first place--that "[t]he federal courts are a unitary system having nation-

wide jurisdiction. If there is another more convenient forum in the United States, then the remedy is to transfer the case under 28 U.S.C. § 1404, rather than dismiss for forum non conveniens." *Pearl Cruises v. Cohon*, 728 So.2d 1226, 1228 n.* (Fla. 3rd DCA), *review denied*, 744 So. 2d 453 (Fla. 1999). Application of the state rule by the state court was thus a purposeful repudiation of a defining characteristic of the federal judicial system, and the district court's adoption of that state rule echoed that repudiation.

As the state court recognized, administration of the f.n.c. doctrine in federal cases, whether based on diversity or not, requires application of a standard grounded in the nature ***26** of the unitary federal system. *See* citations *infra.* And the availability of a federal forum is not unitary if different rules control access to the federal courthouse in diversity cases filed in different federal courts. Contrary to the district court's conclusion (R2-52-13, 17), we believe that this concern for unity informed the decision in *In Re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982*, 821 F.2d 1147 (5th Cir. 1987) (en banc), *vacated on other grounds sub nom. Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989). Admittedly, the state law in *New Orleans* was more hospitable to the plaintiff than the federal f.n.c. standard, *see id.* at 1155; and admittedly, as Judge Highsmith noted (R2-5213), the court in *New Orleans* emphasized the "internal administrative and equitable powers of our courts," their "self-regulatory powers," and "the interest of the federal forum in self-regulation, in administrative independence, and in self-management ...." *Id.* at 1158-59. However, the court in *New Orleans* also was expressly concerned with the disparity, and the opportunity for forum shopping, in the application of different forum-non-conveniens standards in diversity cases filed in different courts, and thus with the "internal consistency" of the federal system. 821 F.2d at 1158.[FN20]

> FN20. Judge Highsmith also cited *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 828 (5th Cir.), *cert. denied*, 508 U.S. 973 (1993), for the proposition that "the overriding federal interest justifying application of the federal standard has been the federal district court's inherent power to control their dockets" (R2-52-17). But *Baumgart* doesn't address the *Erie* issue. It merely notes, in the course of applying the federal f.n.c. standard, that the federal f.n.c. rule is designed in part to control the district court's docket.

The same concern informed *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1069 (8th Cir. 1986), which applied federal law in a diversity case to the enforceability of a contractual forum-selection clause assertedly requiring a foreign jurisdiction, *see infra* p. 31. It held that "we support a policy of uniformity of venue rules within the federal ***27** system, as well as the policies underlying *The Bremen* [*v. Zapata Offshore Co.*, 407 U.S. 1 (1972) (holding that federal law governed the enforceability of a forum clause in an admiralty case)]."[FN21] These decisions recognize that the propriety of a federal f.n.c. standard derives in part from the unitary nature of the federal system. The district court's decision in the instant case was precisely the opposite.[FN22]

> FN21. *Accord*, *Royal Bed and Spring Co. v. Famossul* Industria *e Comerciode Moveis Ltda.*, 906 F.2d 45, 50 (1st Cir. 1990) (agreeing with *Sun World* that the need for uniformity required that federal law control enforceability of a forum-selection clause calling for Puerto Rico in a diversity case). *See generally Simler v. Conner*, 372 U.S. 221, 222 (1963) (in diversity cases, "only through a holding that the jury-trial *right* is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved"); *Exxon Corp. v. Chick Cam Choo*, 817 F.2d 307, 320 (5th Cir. 1987) (enforcing *The Bremen* in holding that a forum-non-conveniens dismissal of an admiralty case in federal court was res judicata in state court, in part because of the need for "uniformity and predictability of maritime law ... by all courts in the United States"--an objective "particularly acute

because of the transnational and international nature of the interests at stake in a *forum non conveniens* inquiry"), *rev'd on other grounds*, 406 U.S. 140 (1988).

FN22. Judge Highsmith also invoked the principle of uniformity as one basis for his decision, finding it more important that one rule govern within the boundaries of a given state than that one rule govern throughout the federal system (R2-52-17-18): "District courts sitting in diversity should, therefore, apply the same restrictions on litigants and litigation as the courts of the state in which they sit.... If federal courts were not to apply state law bars in diversity actions, state policy decisions concerning court access could readily be defeated simply by filing suit in federal court.... Such a result is contrary to the purposes of diversity jurisdiction and runs afoul of *Erie*.... The concerns of forum shopping and the equitable administration of justice, which are rooted in principles of federalism and comity, clearly further support the application of Florida forum non conveniens in the instant case." In thus exalting the sanctity of state geographic boundaries over the sanctity of the federal judicial system, the district court did not acknowledge that it was creating an even greater disuniformity--between different federal courts in different states. *See, e.g.*, *Exxon Corp. v. Chick Cam Choo*, 817 F.2d 307, 315 (5th Cir. 1987) (holding that federal law controls the issue of forum non conveniens in an admiralty case, and thus that a federal dismissal on that ground was res judicata in a subsequently-filed state action, because otherwise "crucial aspects of the outcome of the litigation will turn on the fortuities of diversity"), *rev'd on other grounds*, 406 U.S. 140 (1988).

***28** *c. Protecting Federal Interests in International Relations.* Third, as the quotation in footnote 21 from *Exxon Corp. v. Chick Cam Choo* suggests, there is an important foreign-policy aspect to the question of forum non conveniens, since the doctrine by definition implicates the interests and policies of other nations. The court in *Chick Cam Choo* noted:

Matters of import to foreign relations are inherently matters of uniquely federal competence.

[T]he need for uniform application of the doctrine by all courts in the United States is particularly acute because of the transnational and international nature of the interests at stake in a *forum non conveniens* inquiry.

[P]lenary federal power over international relations ... powerfully confirms our conclusion that federal *forum non conveniens* doctrine must apply to maritime cases in state courts.

In situation after situation, Congress and the Supreme Court have made the availability of courts in the United States to foreign plaintiffs and against foreign defendants exclusively a matter of federal law, and they have consistently mandated self-restraint in asserting jurisdiction over arguably foreign disputes.

817 F.2d at 318, 320, 321-22. *Accord, Rivendell Forest Products, Ltd. v. Canadian Pacific Ltd.*, 2 F.3d 990, 992 (10th Cir. 1993) ("foreign policy implications of *forum non conveniens* decisions militate in favor of applying federal law"), *citing* Stein, *Erie and Court Access*, 100 Yale L.J. 1935, 2002 (1991).

As the court in *Chick Cam Choo* pointed out, federal law controls virtually every aspect of the international role of courts in the United States. *See generally* ***29***Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). In *Zschernig v. Miller*, 389 U.S. 429, 436 (1968), the Supreme Court held that state inquiries into the internal affairs of foreign nations violate the Supremacy Clause, because they intrude upon the exclusive fed-

eral power over foreign affairs and international relations. In *Toll v. Moreno,* 458 U.S. 1 (1982), the court held that a state university could not charge resident aliens out-of-state tuition because aliens are exempt from state taxation under federal law. In *Graham v. Richardson,* 403 U.S. 365 (1971), the court held that state restrictions on welfare benefits available to resident aliens were pre-empted by federal authority to regulate immigration. And in *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964), the court held that the federal "act of state" doctrine, which counsels judicial restraint in international relations, applies in diversity cases, pre-empting any analogous state doctrines. As the court pointed out in *Chick Cam Choo,* 817 F.2d at 321, the act of state doctrine, "like the doctrine of *forum non conveniens,* is a prudential doctrine of judicial self limitation in an international context." *See* R. Falk, *The Role of Domestic Courts in the International Legal Order,* 9 (1964) (the "decision to defer [under the act of state doctrine] is a way of explaining that a domestic court is not a suitable forum within which to make the determination of validity. In this respect, the act of state doctrine resembles the doctrine of *forum non conveniens*").

Foreign policy considerations also affect the exercise of personal jurisdiction in federal courts: the "Federal interest in foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens of an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State." *Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102 (1987). The federal interest in international ***30** relations is so compelling that in proper cases it will convert an ostensibly state-law claim into a claim governed by federal law, and warrant removal as a result. *See Texas Industries v. Radcliff,* 451 U.S. 630, 641 (1981); *Pacheco de Perez v. AT&T,* 139 F.3d 1368, 1376-77 (11th Cir. 1998); *Torres v. Southern Peru Copper,* 113 F.3d 540, 543 (5th Cir. 1997); *Republic of Iraq v. First National City Bank,* 353 F.2d 47, 50 (2nd Cir. 1965), *cert. denied,* 382 U.S. 1027 (1966).

d. Protecting a Plaintiffs Right to Choose His Forum. Fourth and finally, the district court's analysis suggests another important federal interest-- protection of a plaintiffs right to choose his own forum. *See Gulf Oil Co. v. Gilbert,* 330 U.S. 501, 508 (1947). As *Gilbert* and its progeny hold, especially for an American plaintiff (six American plaintiffs in this case), that right is a fundament of federal policy. *See Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 249 n.15, 255 (1981); *Swift & Co. Packers v. Compania Colombiana del Caribe,* 339 U.S. 684, 697 (1950); *Koster v. Lumbermens Mutual Casualty Co.,* 330 U.S. 518, 524 (1947). As the district court's reasoning makes clear, however, the plaintiffs right would be fundamentally undermined by a doctrine which enforces the federal standard only when it is less favorable to the plaintiffs choice than the state rule, but defers to the state rule whenever it is more likely to reject the plaintiffs choice.

In *Exxon v. Chick Kam Choo,* 817 F.2d at 318-19, the court properly eschewed a rule of admiralty--called the "thumb-on-the-scales concept"--which would have subordinated state law whenever it treated the plaintiff less favorably than the analogous federal rule. The district court's decision in the instant case would do the opposite; it would choose whichever f.n.c. rule hurts the plaintiff the most. In *Sibaja,* 757 F.2d at 1218, this Court quoted the Supreme Court's declaration in *Gumbel v. Pitkin,* 124 U.S. 131, 144 (1888), that federal ***31** jurisdiction should "prevent abuses, oppression, and injustice ...." Given the important federal interest in protecting an American plaintiffs right to choose his forum, a uniform federal f.n.c. standard is vital to "prevent ... injustice."

e. Analogous Contexts in Which Federal Law Applies. In light of these four federal interests, which reach well beyond the court's concern for the size of its docket, the district court clearly erred in finding "no compelling federal interest ... which would warrant application of the federal standard over the state standard" (R2-52-17). In a variety of analogous contexts, these important federal interests have resolved the *Erie* inquiry in favor of a

uniform federal standard. The closest analogue, as we have noted already, *supra* p. 26, is the federal standard for evaluating the enforceability of contractual forum-selection clauses, when they call for non-U.S. jurisdictions.[FN23] Even absent a federal statute, "enforceability of a forum-selection clause ... is clearly a procedural issue," and "a policy of uniformity of venue rules within the federal system" requires that "federal law controls." *Royal Bed and Spring Co. v. Famossul Industria e Comercio de Moveis Ltda*, 906 F.2d 45, 50 (1st Cir. 1990).[FN24]

FN23. The Supreme Court has held that forum clauses calling for litigation in U.S. states are governed by 28 U.S.C. §1404, whose application pre-empts the *Erie* question. *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 25-27 (1988). *See Roberts & Schaefer Co. v. Merit Contracting, Inc.*, 99 F.3d 248, 251-52 (7th Cir. 1996), *cert. denied*, 520 U.S. 1167 (1997); *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 512 (9th Cir. 1988). *See* 17 *Moore's Federal Practice* §124.08 [2], at 124-60-61 (3rd ed. 2000).

FN24. *Accord*, *Haynsworth v. The Corporation*, 121 F.3d 956, 961-62 (5th Cir. 1997), *cert. denied*, 523 U.S. 1072 (1998); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 159-61 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 209-11 (7th Cir. 1993); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1069 (8th Cir. 1986). *See also Jones v. Weibrecht*, 901 F.2d 17, 19 (2nd Cir. 1990) (§1404, and thus *Stewart*, *supra* note 23, do not apply when "a party seeks to have an action dismissed or remanded to state court, rather than transferred, on the basis of a forum selection clause that purports to preclude litigation from a venue other than a specific state court"; *Erie* balancing calls for federal law). This Court reached the same conclusion in *Stewart* on the issue of a forum-clause transfer to another state, before the Supreme Court affirmed on the alternative ground that 28 U.S.C. § 1404 foreclosed the *Erie* analysis. *Stewart Organization, Inc. v. Ricoh*, 810 F.2d 1066, 1068 (11th Cir. 1987) (en banc), *aff'd on other grounds*, 487 U.S. 22 (1988). *Compare Alexander Proudfoot Co. World Headquarters L.P. v. Thayer*, 877 F.2d 912, 916-19 (11th Cir. 1989) (although *Stewart* holds that § 1404 controls enforceability of forum clause, absent a controlling statute state contract principles determine consent to jurisdiction); *Arrowsmith v. United Press International*, 320 F.2d 219, 226-27 (2nd Cir. 1963) (en banc) (cited by the district court at R2-52-18) (state law determines whether a corporation is present in the jurisdiction for purposes of service and jurisdiction).

***32** A second example is the uniform federal standard for appraising the sufficiency of evidence to create an issue of fact. *See Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc). *See Jones v. Miles Laboratories, Inc.*, 887 F.2d 1576, 1578 (11th Cir. 1989); *Miles v. Tennessee River Pulp and Paper Co.*, 862 F.2d 1525, 1527-28 (11th Cir. 1989); 17 *Moore's Federal Practice* § 124.07[7] [c], at 124-58 (3rd ed. 2000) (*Boeing* states the majority rule). Differing standards may clearly be outcome-determinative, but *Boeing* held the federal standard applicable in diversity cases "in order to preserve 'the essential character' of the federal system." 411 F.2d at 369-70, *quoted in In Re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d at 1158-59 ("federal courts have inherent powers under Article III to displace state laws on matters involving their basic competence as courts. *Boeing* and *Jones* [*v. Benefit Trust Life Ins. Co.*, 800 F.2d 1397 (5th Cir. 1986) (discussed *infra*)] are correct because the relationship between judge and jury goes to the heart of the independence and integrity of an Article III court"). *See id.* at 1183 (Higginbotham, J., concurring) ("*Boeing* and *Jones* are correct ... because the seventh amendment sets one standard for all federal courts for defining the relationship between judge and jury. The interest in ***33** uniformity is a powerful federal interest that overwhelms the limited state interest in state rules that would leave for jury decision more than is constitutionally required, rules that implement but are not integral to policies of substance").

Third, the Fifth Circuit Court held in *Jones*, cited above, that federal law controlled the standard in a diversity case for determining whether to submit the issue of punitive damages to the jury, pre-empting a Louisiana law requiring the trial court to make a preliminary determination that a defendant insurer had no "reasonably arguable" basis for denying coverage. *See In Re Air Crash Disaster Near New Orleans,* 821 F.2d at 1159 (*Jones* applied the federal rule "even though the state standard clearly involves important substantive state policies of insurance regulation, and even though the federal standard will consistently skew the results ...)" Similarly, this Court has declined to apply in diversity cases a Florida statute requiring the trial court to screen the plaintiffs evidence before a claim for punitive damages can be pleaded. *See Cohen v. Office Depot, Inc.,* 184 F.3d 1292, 1295-99 (11th Cir. 1999), *cert. denied,* _____ U.S. _____, 121 S. Ct. 381 (2000). These decisions reflect the overriding need for uniformity in matters of pleading and proof in the federal system.

Fourth, the Supreme Court held in *Simler v. Conner,* 372 U.S. 221 (1963) that federal law "governs in determining whether an action is 'legal' or 'equitable' for the purpose of deciding whether a claimant has a right to a jury trial."[FN25] Citing *Byrd v. Blue Ridge Electric Cooperative, Inc.,* 356 U.S. 525 (1958), which had declined to apply a state law requiring the judge to decide on the evidence whether a defendant was a statutory employer for workers-compensation purposes, the court in *Simler* said that "[t]he federal policy favoring jury trials ***34** is of historic and continuing strength," and "[o]nly through a holding that a jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved." *Simler,* 372 U.S. at 222. All of these examples reflect values other than the federal court's control of its docket--values which are equally applicable in the instant case.[FN26]

> FN25. *See Gallagher v. Wilton Enterprises,* 962 F.2d 120, 122 (1st Cir. 1992); *Cooper Labs, Inc. v. International Surplus Lines, Inc. Co.,* 802 F.2d 667, 671 (3rd Cir. 1986).

> FN26. *See also Semtek International, Inc. v. Lockheed Martin Corp.,* 14 Fla. L. Weekly Fed. S109 (U.S. Dec. 5, 2000) (claim-preclusive effect of federal court's dismissal of diversity action as time-barred is governed by federal law, which in turn incorporates the claim-preclusion law of the state in which the federal court sits); *Chambers v. NASCO, Inc.,* 501 U.S. 32 (1991) (federal law governs imposition of sanctions in diversity case); *Lundgren v. McDaniel,* 814 F.2d 600, 606 (11th Cir. 1987) (in pendent state claim against local sheriff--to which *Erie* also applies, *see United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726 (1 966)-- Florida statute governing timing of filing of action after notification did not preclude plaintiffs amended complaint, given strong federal interest in allowance of amendment); *Precision Air Parts, Inc. v. Avco Corp.,* 736 F.2d 1499, 1503 (11th Cir. 1984) (res judicata effect of prior diversity judgment governed by federal law), *cert. denied,* 469 U.S. 1191 (1985); *Aerojet-General Corp. v. Askew,* 511 F.2d 710, 715-18 (5th Cir. 1975) (same), *cert. denied,* 423 U.S. 908 (1975).

On the basis of the foregoing, the Appellants respectfully submit that there is far more to the federal interest in applying federal law to the issue of forum non conveniens in diversity cases than only the federal courts' management of their dockets. Whether the federal f.n.c. standard in a given case is stricter or more-welcoming than that of the state in which the federal court sits, the need for uniformity in application of the doctrine, the inherent nature of the unitary federal system, the primacy of federal law in issues of foreign policy, and the importance of a plaintiffs choice of forum all strongly counsel application of federal f.n.c. law in diversity cases. In numerous analogous contexts, these important values have required application of federal law. The district court erred in ruling otherwise.

2. The State Interests. Finally, we submit that these federal interests outweigh the ***35** assertedly-countervailing

state interests which the district court found important--"(1) the prevention of forum shopping and (2) the equitable administration of justice" (R2-52-17). Judge Highsmith's reasoning was that "[d]istrict courts sitting in diversity should ... apply the same restrictions on litigants and litigation as the courts of the state in which they sit" (*id.* at 17-18). Judge Highsmith reasoned that application of the federal f.n.c. standard in diversity cases would attract Florida plaintiffs to federal court, and "state policy decisions concerning court access could readily be defeated ..." (*id.* at 18).

As we have pointed out, however, *supra* pp. 25-27, the district court's disposition creates a corresponding incentive to forum shop, given that different f.n.c. standards would apply in diversity cases in different federal districts. Accepting the district court's reasoning, plaintiffs whose diversity cases implicate more than one federal district would be encouraged to choose the more favorable f.n.c. law; and of course a transfer of the case under 28 U.S.C. §1404(a) would not prevent such forum shopping, because the transferor state's f.n.c. rule would apply. *See Ferens v. John Deere Co.*, 494 U.S. 516 (1990). Therefore, the district court's concern for forum shopping cannot provide a strong argument for application of the state's f.n.c. rule. And in any event, we submit that any such consideration is clearly outweighed by the overriding federal interests discussed about.

VII

CONCLUSION

It is respectfully submitted that the order of the district court should be reversed, and the cause remanded with instructions to deny the motions to dismiss for forum non conveniens. In the alternative, at the very least the order should be reversed with instructions that it be amended to require Costa Crociere to submit to jurisdiction in Washington or ***36** California, the Plaintiffs' residences.

Patricia ESFELD and Donald Esfeld, Appellants, v. COSTA CROCIERE, S.P.A., Appellee. Eleanor COHON and Julian Cohon, her husband, Appellants, v. COSTA CROCIERE, S.P.A., Appellee. Belle BESTOR and Stanley Bestor, her husband, Appellants, v. COSTA CROCIERE S.P.A., a foreign corporation doing business in Miami-Dade County, Florida, Appellee.
2001 WL 34119598 (C.A.11) (Appellate Brief)

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